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D.S., Appellant)	
)	
and)	Docket No. 21-1296
)	Issued: March 23, 2022
DEPARTMENT OF VETERANS AFFAIRS,)	
DORIS MILLER VA MEDICAL CENTER,)	
Waco, TX, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On August 28, 2021 appellant filed a timely appeal from an April 5, 2021 merit decision and an August 24, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

² The Board notes that, following the August 24, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on January 29, 2021, as alleged; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On February 24, 2021 appellant, then a 61-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that, on January 29, 2021, she sustained injuries to her neck, back, hips, right arm, right elbow, right leg, and right knee while in the performance of duty. She reported that, as she turned right on the sidewalk toward her car, she stepped into a hole in the ground, causing her to lose her balance, twist her body, and fall backwards. Appellant also claimed that she experienced blurred vision, difficulty balancing, and intermittent headaches. On the reverse side of the claim form, her supervisor, indicated that appellant was not injured in the performance of duty because she was leaving work for the day at the time of the fall. She stopped work on February 1, 2021.

In a March 2, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her as to the type of factual and medical evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond. No further evidence was received.

By decision dated April 5, 2021, OWCP denied appellant's traumatic injury claim, finding that the submitted evidence did not establish that the January 29, 2021 incident occurred, as alleged. It noted that appellant had not completed and returned its factual questionnaire. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received a February 5, 2021 medical report from Dr. Gilbert Mayorga, a Board-certified family medicine specialist, relating that appellant was "performing her usual job duties" on or about January 29, 2021 and, as she was exiting the building, lost her footing, slipped, and fell backwards, twisting her right knee. He noted appellant's symptoms of pain, discomfort, and loss of range of motion in her neck, thoracic spine, and lumbosacral spine, pain and discomfort of the right upper extremity, intermittent numbness and tingling in the upper and lower extremities, and pain, discomfort, swelling, and abrasions to her right knee. He examined appellant and diagnosed sprains of the cervical spine, thoracic spine, lumbosacral spine, right elbow, right shoulder, right wrist, and right knee, as well as lumbar radiculitis, cervical radiculitis, and abrasions and contusions of the right arm and right knee. Dr. Mayorga advised that appellant should remain off work.³

³ Appellant underwent multiple x-ray scans on February 12, 2021. The cervical spine x-ray revealed C2-3 facet fusion and multilevel spondylosis with C4-5 anterior osteophyte formation. The lumbar spine x-ray revealed no acute findings. The right knee x-ray revealed a bipartite patella with advanced degenerative change versus old healed fracture with advanced degenerative change in the patellofemoral articulation. The right shoulder x-ray revealed acromioclavicular arthropathy and probably calcific peritendinitis, but no evidence of fracture. The right elbow and right wrist x-rays were negative for fracture or dislocation.

On July 2, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 24, 2021, OWCP denied appellant's request for an oral hearing as untimely filed, finding that her request was not made within 30 days of the April 5, 2021 OWCP decision as it was postmarked on July 2, 2021. It further exercised discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,⁵ that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.⁸ Fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.⁹ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹⁰

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹¹ The employee has not met his or her burden of proof to establish the occurrence of an

⁴ *Supra* note 1.

⁵ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁹ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

injury when there are inconsistencies in the evidence that cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.¹² An employee's statements alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on January 29, 2021, as alleged.

Appellant has not established the factual component of her claim as she has insufficiently explained how and where the claimed injury occurred.¹⁴ In her February 24, 2021 Form CA-1, she indicated that on January 29, 2021 she sustained multiple injuries when she turned right on the sidewalk toward her car, stepped into a hole in the ground, lost her balance, twisted, and fell backwards. On the reverse side of the claim form her supervisor indicated that appellant was leaving work for the day at the time of her injury. Appellant did not submit a detailed account of the alleged injury or any additional corroborating factual evidence describing how and where she sustained an injury on January 29, 2021. The Board has held that such a vague recitation of facts does not support a claimant's allegation that a specific event occurred to cause a work-related injury.¹⁵

OWCP, in its March 2, 2021 development letter, informed appellant of the type of factual and medical evidence needed to establish her traumatic injury claim. It requested that she complete an attached questionnaire and provide a detailed factual description of the alleged employment incident. Appellant, however, did not respond.¹⁶

Appellant has not provided a sufficient description of the alleged employment incident and the mechanism by which she sustained an injury; therefore, the Board finds that she has not met her burden of proof.¹⁷ As appellant has not met her burden of proof to establish that an incident occurred in the performance of duty, as alleged, it is unnecessary to address the medical evidence of record regarding causal relationship.¹⁸

¹² *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

¹³ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

¹⁴ *See E.C.*, Docket No. 19-0943 (issued September 23, 2019).

¹⁵ *M.C.*, *supra* note 13; *M.B.*, Docket No. 11-1785 (issued February 15, 2012).

¹⁶ *See M.F.*, *supra* note 11.

¹⁷ *H.D.*, Docket No. 15-1698 (issued May 4, 2016).

¹⁸ *J.C.*, Docket No. 19-0542 (issued August 14, 2019); *see M.P.*, Docket No. 15-0952 (issued July 23, 2015); *Alvin V. Gadd*, 57 ECAB 172 (2005).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that “a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary.”¹⁹ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.²⁰ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking and before the claimant has requested reconsideration.²¹ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

OWCP’s regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which review is sought.²² Because appellant’s hearing request was postmarked on July 2, 2021, it post-dated OWCP’s April 5, 2021 decision by more than 30 days and, therefore, is untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.²³

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.²⁴ The Board finds that, in the August 24, 2021 decision, OWCP properly exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration before OWCP, along with the submission of additional evidence.

The Board has held that the only limitation on OWCP’s authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable

¹⁹ 5 U.S.C. § 8124(b)(1).

²⁰ 20 C.F.R. §§ 10.616, 10.617.

²¹ *Id.* at § 10.616(a).

²² *Supra* note 19; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (September 2020).

²³ *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

²⁴ *Id.*

exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.²⁵ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on January 29, 2021, as alleged. The Board further finds that OWCP properly denied her request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the April 5 and August 24, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 23, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁵ *Id.*